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In re Application of	:
Nancy Elizabeth Krauss et al	:
Serial No.: 09/844,061	: PETITION DECISION
Filed: April 26, 2001	:
Attorney Docket No.: R0070B-REG	:

This is in response to the petition under 37 CFR 1.181, filed March 31, 2003, for withdrawal of abandonment of the above identified application based on failure to receive an Office action. The delay in acting on this petition is regretted.

A review of the file history shows that the examiner mailed a first Office action to applicants on December 14, 2001, setting forth a restriction requirement and telephonic election and rejecting the elected claims under 35 U.S.C.112, first and second paragraphs and under 35 U.S.C.102(b) and 35 U.S.C.103(a) for various reasons.

Applicants replied on March 8, 2002, amending some claims and presenting arguments with respect to each rejection. The examiner then mailed a Final Office action to applicants on May 6, 2002, withdrawing the rejections under 35 U.S.C. 112, first and second paragraphs, but maintaining two rejections under 35 U.S.C. 102(b) and setting forth two new rejections under 35 U.S.C. 102(b) and a new rejection under 35 U.S.C. 103(a).

Applicants first replied on August 6, 2002, amending again several claims and arguing the rejections. The examiner mailed an Advisory Action to applicants on September 6, 2002, the amendment would not be entered for various reason, but indicating that several rejections had been withdrawn leaving only a rejection under 35 U.S.C. 103(a).

Applicants then submitted a second amendment after Final rejection following a telephone interview with the examiner (no examiner interview record thereof) on October 2, 2002, with a two month extension of time and fee therefore. The examiner mailed a second Advisory Action to applicants on February 26, 2003, again refusing entry of the amendment for various reasons.

Applicants then submitted this petition to reset a reply period or to revive an unavoidably abandoned application. In the petition for resetting a reply period applicants cite the delay of over four months in mailing an Advisory action in response to the amendment filed October 2, 2002, and defects therein are grounds for resetting the date for reply to the outstanding Office

action. Applicants also argue, for the first time, that the Office action of May 6, 2002, was prematurely made Final, setting forth reasons therefore.

Applicants, however, misapprehend the ability of the Office to reset the start date of a statutory period. In this situation applicants timely received an Office action which was a Final Office action and which set a shortened statutory period for reply of three months, the maximum statutory period for reply being six months. By applicants receiving the Office action they were put on notice that a reply was required within six months which reply could be either an amendment which placed the application in condition for allowance, a Notice of Appeal or the filing of a continuing application (CPA or RCE). As of November 6, 2002, applicants had filed two amendments which, according to the examiner, did not place the application in condition for allowance. In neither amendment was an argument made that the Office action was prematurely made Final. That the second amendment was not considered and applicants notified of the results of that consideration prior to the expiration of the six month statutory period for reply did not relieve applicants of their responsibility to file either a Notice of Appeal or continuing application papers. It also is not grounds for resetting the date for reply to the date of the last Advisory action.

Thus the petition to reset the period for reply is **DENIED**.

Applicants' incorporated petition to remove the finality of the Office action of May 6, 2002, is untimely. A petition from an examiner's action under 37 CFR 1.181 must be filed within two months of the action complained of. It may also be required that the action be a repeated action. In this instance the action now being complained of is finality of the Office action. The repetition of this action was in the Advisory Action mailed September 6, 2002. The first argument raising this issue was not presented until March 31, 2003, more than six months after the repeated action and not as a separate petition, but as a supporting argument for resetting a date for reply. As such this petition is **DENIED** as untimely.

The alternative petition under 37 CFR 1.137(a) is inappropriate as it should be presented as a separate petition. It is also deficient in that It fails to set forth any circumstances which prevented applicants from filing a timely reply. Such circumstances are in the nature of events beyond the control of applicants or their representative that prevents a timely reply, such as a fire which destroys a place of business and records associated therewith. Since this petition does not present such circumstances this petition is also **DENIED**.

All petitions are **DENIED**.

The application will be forwarded for storage as appropriate.

Applicants may wish to seek revival of this application by filing of a petition under 37 CFR 1.137(b) with the Office of Petitions. The RCE papers would constitute the proper response required for revival under 37 CFR 1.137(b).

Should there be any questions about this decision please contact William R. Dixon, Jr., by letter addressed to Director, TC 1600, at the address listed above, or by telephone at 571-272-0519 or by facsimile sent to the general Office facsimile number.

Bruce M. Kisliuk
Director, Technology Center 1600